

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and Claude Defay,
Complainant

v.

Docket No: 11-BEM-03416

BOSTON POLICE DEPARTMENT,
Respondent

Appearances: Rebecca Izzo, Vinita Ferrera, Stephanie Smith, and Molly Clayton, Esqs.
for Complainant
Meryum Kahn and Peter Geraghty Esqs. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 23, 2011, Claude Defay ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging that the Boston Police Department discriminated against him on the basis of race (black) when it dismissed him from the Boston Police Academy for allegedly cheating on an exam. A probable cause finding was issued by the Investigating Commissioner on July 28, 2013.

The case was certified for public hearing on August 26, 2014. A public hearing took place on July 7, 8, 9, and 14, 2015 and on September 3, 2015. The following witnesses testified at the public hearing: Complainant, Boris Vragovic, Michael Burke, Michael Chapman, Paul Joyce, Domingas Rosa, William Shaw, Gary Eblan, Darryl Owens, and John Ezekiel. The parties submitted eighteen (18) agreed-upon exhibits. In

addition, Complainant submitted seventeen (17) additional exhibits, and Respondent submitted seven (7) additional exhibits.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Claude Defay is a resident of Dorchester, Massachusetts who is black and of Haitian ethnicity. In 2005, he received a bachelor's degree in management with a concentration in finance from the University of Massachusetts. Upon graduation, he obtained a position as a compliance specialist at Investors Bank and Trust. He subsequently obtained a position at J.P. Morgan and thereafter at Deutsch Bank where he remained for more than three years. Complainant took the civil service exam for police officer in April of 2009 and was accepted into the Boston Police Academy in December of 2010. He testified that he left the financial industry because of a "drive and passion" to serve his community. Transcript I at 44.
2. The Boston Police Academy conducts a twenty-six week training program for police recruits. The program is broken into an academic part and a practical training part. Transcript III at 90. During the academic portion of the training, there are eight weekly tests plus a midterm and a final. Transcript I at 47; III at 91, 105. Complainant's weekly exams averaged 77.75, his mid-term exam grade was 82.5, his final exam grade was 84.25 (including 78% on the written communication subpart), and his overall grade for the academic portion of the Academy was 81.5%. Respondent's Exhibit 6.

3. If a recruit fails three weekly exams, the recruit is dismissed from the Academy for academic reasons. If a recruit fails a specific subject section on a midterm or final exam, the recruit may re-take that section provided the recruit passes the overall exam but if a recruit fails to achieve a passing grade on the overall exam, the recruit is dismissed from the Academy. Joint Exhibit 2, Rule 7-8; Transcript I at 52, II at 45, IV at 22-23.
4. The command staff of the Boston Police Academy consists of the Registrar who reports to the Executive Officer who reports to the Academy Superintendent. At all relevant times, the Registrar was Sergeant Gary Eblan, the Executive Officer was Lieutenant Michael Chapman, and the Academy Superintendent was Paul Joyce. All of these individuals are white.
5. The Boston Police Academy Recruit Training Manual 49-10 specifies three classes of disciplinary offenses. Joint Exhibit 2, Rule 5-6. Class I consists of the most serious offenses and class III consists of the least serious offenses. Joint Exhibit 2, Rule 5-7. The commission of a class I offense “may” [Rule 5-7] or “shall” [Rule 5-8] result in the immediate dismissal of the recruit officer based on the totality of the circumstances. [Rule 5-6. The commission of a single class II offense results in a warning but a second class II offense can result in dismissal. Rule 5-7. The commission of a single class III offense may result in counseling or an oral warning, but a second class III offense may result in a written warning. Rules 5-7 & 5-8.
6. An integrity violation is a class I offense. Joint Exhibit 2, Rule 3. Integrity violations include lying, cheating, stealing, acts of academic dishonesty, and plagiarism. Police Commissioner Edward Davis issued a memo on January 20, 2010 which specified that

termination would be the presumptive disciplinary action in cases of untruthfulness on the part of any police officer. Joint Exhibit 16.

7. Conduct unbecoming an officer is also a class I offense. Joint Exhibit 2, Rule 4-4.

According to the Recruit Training Manual, such conduct includes any illegal act, disorderly conduct, and the use of vulgar, humiliating, obscene or offensive language or behavior. Id. Lt. Chapman testified that commission of a “serious misdemeanor” such as domestic violence, assault and battery, or the commission of a felony is a class I offense which generally results in termination whereas receipt of a speeding ticket or a stop sign violation would not be considered a class I offense. Transcript II at 39, 41.

8. The Recruit Training Academy adheres to a progressive discipline policy which includes counseling, oral warnings, written warnings, and dismissal. Joint Exhibit 2, Rule 5-8. Transcript III at 91.

9. On the afternoon of March 21, 2011, Complainant took day one of the Academy’s two-day final exam. Both days of the final lasted four hours, from noon to 4:00 pm. The final was the tenth exam given to the recruit class. Transcript I at 51.

10. Recruits are generally required to use recruit restrooms located on lower (basement) or upper levels of the Academy¹ but while taking exams, they are instructed to use the staff restroom located on the first (main) floor which is the same floor on which the exams are given. Transcript I at 54-55, 110. Complainant received instructions about which bathroom to use at the start of the Academy and in the training manual given out to recruits. Transcript I at 109. At the beginning of each exam, proctors remind recruits that they are to use the first floor staff restroom during the exam. Transcript

¹ The basement contains the gymnasium and the cafeteria, the main floor contains classrooms, and the upper floor contains the recruit locker rooms. Transcript I at 110.

III at 54. Officer Shaw testified that at the start of the final exam on March 21, 2011, recruits received detailed instructions about various matters including bathroom usage. Transcript III at 51-52, 56.

11. Approximately three hours into the March 21, 2011 exam, Complainant asked permission to use the restroom. When he left the exam room to go to the restroom, exam proctor Shaw took his exam and directed Complainant to use the first floor staff bathroom. Transcript I at 111; Joint Exhibit 5. According to Officer Shaw, he watched as Complainant walked down the first floor corridor, observed Complainant go right up to the men's bathroom door on the first floor, and then he (Shaw) returned to proctoring the exam. Transcript III at 57, 72.
12. Complainant claims that he walked to the staff restroom, pushed on the door, but then "second-guessed" himself and went to the recruit restroom on the lower level. Transcript I at 55-56. Complainant testified that he had used the lower-level recruit restroom while taking a previous exam and that "nothing" had happened but he did not include this information in a contemporaneous report he drafted about the March 21, 2011 incident.² Transcript I at 55-56, 123-124. I do not credit Complainant's testimony about his prior bathroom usage.
13. Complainant testified that as he walked towards the lower-level recruit restroom on March 21, 2011, he went through double doors towards a stairwell and encountered Police Officer/family friend Winston DeLeon and Recruit Officer Boris Vragovic who were both on the steps. According to Complainant he said, "What's up?" and Vragovic responded by saying, "What's up? Are you still taking the exam?" [and]

² However, in a supplemental report filed weeks after his separation and following the retention of an attorney, Complainant did assert that he had previously used the downstairs bathroom during a prior exam. Transcript I at 145; Complainant's Exhibit 2.

“Where are you going?” Complainant testified that he answered, “Yes, I’m still taking the exam” and “I’m heading to the restroom.” Transcript I at 59-60. Complainant testified that Officer DeLeon was within earshot of the conversation. Transcript I at 60, 126.

14. According to Complainant, he proceeded to the lower-level restroom. He states that he did not invite Vragovic to go with him but that Vragovic also went into the lower-level restroom and once there said, “Hey, what an exam” and “Domestic violence had a lot of multiple choice questions on there.” Transcript I at 61. Complainant testified that he responded by saying, “Yeah, same thing for written communication.” Transcript I at 61. According to Complainant, he did not ask Recruit Officer Vragovic for an answer to any question on the final exam. Transcript I at 61-62. He asserts that he then went back and finished the exam. I do not credit this testimony.
15. Boris Vragovic is currently a Brookline Police Officer. He attended the same Boston Police Training Academy as Complainant and served as a squad leader. Transcript I at 168. He testified that on March 21, 2011, after turning in his exam, he was going downstairs to the cafeteria when he saw Complainant in the stairwell. Vragovic states that Complainant asked him to go to the downstairs bathroom and they both proceeded there. Transcript I at 156; Joint Exhibit 4. According to Vragovic, he asked if Complainant were still taking the exam as they walked into the bathroom and Complainant’s answer sounded like “yeah” followed by, “Can I ask you a question?” [and] “What did you put down for the cross street number question in written comm?” Joint Exhibit 4; Transcript 156-157. Vragovic testified that he felt “ambushed” and “uncomfortable” and tried to give an evasive response such as, “I don’t know” [or]

“I’m not sure, man ... I guess I put zero or nothing” [or] “I guessed on that one.”

Transcript I at 157-158, 172; Joint Exhibit 4. Vragovic states that Complainant continued to press him in an “aggressive but playful way” for an answer by saying, “Yeah, but is it zero or blank or ...?” Transcript I at 173; Joint Exhibit 4. I credit Vragovic’s testimony about his interaction with Complainant.

16. In the locker room following the exchange, Recruit Officer Vragovic relayed his conversation with Complainant to Recruit Officers Richards and Burke. Transcript II at 19, 24-25, 27. Burke, a class representative, told Vragovic that the matter should be reported to Officer Shaw, the exam proctor. Transcript I at 159, II at 6. Burke informed Shaw about the incident approximately ten minutes later. Transcript III at 58.
17. Officer Shaw instructed Recruit Officer Vragovic to write a Form 26 (an incident report) and turn it in first thing the next day. Transcript I at 160; III at 61. It is standard procedure at the Academy to hand in Form 26 reports at roll call on the day after they are assigned. Transcript I at 160, III at 101.
18. On the following day, March 22, 2011, Complainant met with the Academy’s Registrar, Sergeant Eblan, and the Academy’s Executive Director, Lt. Chapman. Sergeant Eblan instructed Complainant to go immediately to the computer lab and draft a report about his use of the restroom during the previous day’s exam. Transcript I at 64, II at 48-49, III at 112. According to Sergeant Eblan, he did not give Complainant a time limit in which to write his report. Transcript III at 112-113. Complainant took approximately thirty minutes to draft a report. Joint Exhibit 5. In his report Complainant did not mention any discussion between himself and Recruit

Officer Vragovic about the number of multiple choice questions on the exam. Joint Exhibit 5; Transcript I at 125-126.

19. According to Complainant, Lt. Chapman read the report and screamed, “You’re fucking lying. We know you cheated. We’re going to fire you after we’re done with you.” Transcript I at 66. According to Sergeant Eblan, he asked Complainant: 1) if Complainant initiated the conversation with Recruit Officer Vragovic; 2) if Complainant knew he wasn’t supposed to be speaking to other recruits while taking an exam; and 3) if Complainant was still taking his exam at the time. Transcript III at 115. Sergeant Eblan states that Complainant answered in the affirmative to all three questions and then said, “if anybody said that I asked him [Vragovic] any questions on the test, they’re lying” even though Sergeant Eblan maintains that he didn’t identify Vragovic as the accuser.³ Transcript III at 115, 131, 193-194; Joint Exhibit 6, p.3 line 9. I credit Sergeant Eblan’s testimony.
20. On Wednesday, March 23, 2011, Complainant returned to the Training Academy. After roll call, he was taken to the Registrar’s office and was told by Sergeant Eblan that he was being dismissed. Complainant was offered the opportunity to resign in lieu of being terminated, but he refused. Transcript I at 74. Pursuant to the Recruit Training Manual, a recruit who voluntarily resigns is eligible for re-enrollment in a subsequent Academy, subject to appropriate sponsorship by a police department. Joint Exhibit 2, Rule 1-16 (a) 1.
21. During the March 23, 2011 meeting, Sergeant Eblan asked Complainant why Vragovic would come forward with untrue allegations, and Complainant responded by saying

³ Complainant, for his part, testified that he said, “if someone told you that, you know, I cheated on the exam, you know, told him to follow me into the bathroom, this is wrong, you know, none of that happened.” Transcript I at 68.

that Vragovic was reported to have made racial remarks on prior occasions such as referring to “black versus white” soccer teams and his locker being surrounded by minorities. Transcript I at 59, 72, 116. Complainant acknowledged that he did not hear the remarks himself but testified that he was told about them by Recruit Officer Estenel Veillard, who purportedly heard them from other, unnamed recruits. Id. Veillard did not testify at the public hearing. I decline to credit the remarks on the basis that they constitute double hearsay, were allegedly made by unidentified sources, were reported by an individual who declined to testify, and were satisfactorily explained by Officer Vragovic who testified that he made versions of the alleged comments, not as racially-derogative statements, but as light-hearted banter in the locker room.⁴

22. Complainant asserts that he offered to take a polygraph test during his meeting with Sergeant Eblan on March 23, 2011 but that his offer was rejected. Transcript I at 76-77. Sergeant Eblan does not recall such an offer. Transcript III at 135. During Complainant’s deposition when asked about the content of his conversations with Sgt. Eblan and Lt. Chapman on March 22 and 23, 2011, Complainant did not state that he asked to take a polygraph exam. Transcript I at 137. I conclude that the offer was not made.

23. On March 24, 2011, Complainant participated in an administrative hearing conducted by Lt. Chapman which resulted in his dismissal being upheld. Transcript II at 86, 91.

⁴Officer Vragovic acknowledged that he made a statement about “whites versus minorities” in regard to a soccer game in which one of the teams consisted of mostly Haitian-speaking officers who made fun of “white guys” as “awful” at soccer. Transcript I at 175-176. Vragovic testified that he may also have made a locker room joke about being surrounded by minorities in response to being asked, “what does the white boy think?” by Haitian-speaking recruits. Transcript I at 165-166, 176.

24. Complainant appealed his dismissal to the Municipal Police Training Committee and received a hearing in May of 2011. Transcript I at 77-78, II at 91-92. Complainant's dismissal was upheld.
25. Following Complainant's dismissal, Academy Superintendent Joyce met with recruits on March 25, 2011 to address rumors about race issues arising from the fact that the Academy had dismissed two black recruits accused of disciplinary infractions but retained two white recruits accused of disciplinary infractions.⁵ Transcript II at 180-181.
26. Complainant asserts that discipline at the Academy is imposed on a disparate basis depending on the race of recruits. In support thereof, Complainant cites the following examples: 1) white Recruits Bernazzani and Conley only received written warnings for an altercation outside a bar in March of 2011 which resulted in Bernazzani receiving a black eye and six stitches and Conley receiving a bruised fist. Fighting is deemed a class-one offense justifying dismissal per the Academy's Recruit Training Manual. Transcript I at 78-81. In disavowing that they were fighting, the written reports of Bernazzani and Conley both characterize the altercation as "all in fun" and "fooling around." These written reports describe what took place differently from the description given by Recruit Bernazzani to Officer Ezekiel over the phone immediately after the incident. Compare Complainant's Exhibits 4 & 5 with Complainant's Exhibit 3⁶; Transcript II at 93, 96, 100. No one from the Academy interviewed bar employees or patrons to determine what had actually happened.

⁵ The black recruits were Complainant and Rosa and the white recruits were Bernazzani and Conley.

⁶ The written reports state that Bernazzani attempted to grab Conley's waist and Conley attempted to punch Bernazzani in the stomach but hit his eye instead whereas the verbal report states that Bernazzani attempted to jump onto Conley while Conley was on the ground and Conley struck Bernazzani in the eye as Conley got up.

Transcript II at 102. Recruits Bernazzani and Conley were charged with “conduct unbecoming” pursuant to Rule 4-4, a class-one offense, but they were not fired because they “self-reported” and the altercation was deemed to be “horseplay” between friends⁷; 2) black (Cape Verdean) Recruit Domingos Rosa was dismissed from the Academy in December of 2010 for “untruthfulness” based on the allegation that he falsely reported to Officer Welsh that Officer Ezekiel told him **not to** (or that he **didn’t have to**) bring in all his uniforms to class despite written instructions that he do so; that after being repeatedly pressed, he admitted that he had lied; and that he subsequently recanted and said that he had been pressured into “lying about lying” in order to appease the staff. Complainant’s Exhibits 10, 12 & 13; Transcript III at 9-17, 233-236. At the public hearing in this matter, Rosa acknowledged that he failed to follow the written directive to bring in all his uniforms and equipment for inspection, but he credibly denied reporting to Officer Welsh that Officer Ezekiel told him **not to** bring in his uniforms and equipment. Complainant’s Exhibits 10 & 13; Transcript III at 9-16⁸; 3) white Recruit Officer George Flaherty received no discipline for an incident in which he repeatedly told Officer Ezekiel that he had shaved and then switched his answer to “no.” Officer Ezekiel testified that he could not recall the incident, but Rosa and Complainant testified credibly that they witnessed the interaction. Complainant’s Exhibit 17⁹; Transcript I at 84, III at 22-23, 37, V at 16; 4)

⁷ Conley did not accompany Bernazzani to the hospital for emergency treatment. Transcript II at 93-95, 102; III at 220.

⁸ Rosa’s termination was changed to a dismissal for non-disciplinary reasons so that he could re-apply for future Academy training if sponsored by a police department but to date he has not been able to secure such sponsorship. Transcript III at 238-240.

⁹ Complainant’s Exhibit 17 is a Form 26 in which Recruit Officer Flaherty states that he, “failed to follow instruction by not shaving. I have no excuses for the reason why I did not shave the morning before reporting to the Boston Police Academy.” The report does not address whether or not Recruit Flaherty changed his answer when asked if he had shaved in the morning.

Recruit Officer Flaherty subsequently received only an oral warning for drunkenly addressing a Boston police officer in public even though Rule 1-11 makes it a class I offense to engage in off-duty use of alcohol sufficient to discredit the Academy; 5) three weeks after receiving the oral warning, Flaherty ran a red light while driving sixty miles an hour in a forty mile per hour zone and only received a written warning even though Rule 5-8 provides for dismissal from the Academy for a class I offense or a class II offense following imposition of a prior disciplinary warning. Complainant's Exhibits 7 & 8; Transcript II at 105-107, III at 222-226; 6) black Recruit Officer Melvin Ligon received a written warning the second time he was cited for the failure to carpool (a class III offense) even though a class III offense only calls for an oral warning in the second instance. Rules 1-7 and Rule 5-7; Respondent's Exhibit 3; 7) Recruit Officer Ligon received a second written warning for failing to return property to a former employer (a trial court uniform) which the Academy chose to treat as a class I violation of Rule 4-4 (conduct unbecoming) rather than a class III violation of Rule 4-1 for discourtesy. Respondent's Exhibit 2; Transcript III at 148-153, 204; 8) black Recruit Officer Peter King was accused of cheating by writing in an exam booklet, and despite the fact that the cheating allegation was overturned, the Academy gave King a written warning (third-level discipline) for writing in the exam booklet. Transcript III at 158, 205-207, 253-254.

27. After being dismissed from the Recruit Training Academy, Complainant was unemployed for eight months. Transcript I at 87. He received unemployment benefits during this period. Id. The award of unemployment benefits was reversed by the Department of Unemployment Assistance, but Complainant wasn't required to pay

back the money already received. Transcript I at 122-123. In December of 2011, Complainant obtained employment in the financial services industry working for Santander Bank. He commenced as a consultant earning \$35 per hour for a forty-hour week plus twenty to thirty hours of weekly overtime. He thereafter obtained a salaried position with a base salary “relatively the same” as the base salary at the Boston Police Department. Complainant testified that he also earns overtime as a salaried employee at Santander. Transcript I at 90.

28. Complainant testified that he experienced anxiety and depression as a result of being terminated by Respondent. He describes himself as being in a “dark place” where he lacked the drive to do anything including his mixed martial arts practice. Transcript I at 91-92. He attended marriage counseling with his wife for just under a year to deal with the emotional turmoil caused by his termination. Transcript I at 96. A year after his termination, Complainant went to the emergency room and was diagnosed as having a panic attack. Transcript I at 92; Complainant’s Exhibit 1.

III. CONCLUSIONS OF LAW

A. Disparate Treatment Based on National Origin and Race

In the absence of direct evidence of discrimination,¹⁰ Complainant may establish a prima facie case of disparate treatment based on national origin and race under M.G.L. c. 151B, sec. 4(1) by showing that he: (1) is a member of a protected class; (2) was performing in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of his protected

¹⁰ Complainant did not proffer direct evidence of discrimination and, thus, a direct evidence analysis is not employed. See Wynn & Wynn, P.C. v MCAD, 431Mass. 655, 665 (2000) *quoting* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) (defining direct evidence as resulting in the “inescapable, or at least highly probable” inference of discrimination).

class. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of prima facie case vary depending on facts); Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665-666, n.22 (2000); Blare v. Husky, 419 Mass. 437, 441 (1995). The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as “not onerous,” requiring only that a qualified individual cite circumstances “which give rise to an inference of unlawful discrimination.” Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Complainant was a black police recruit in Boston Police Training Academy Class 49-10. Until terminated for cheating on the final exam, he was, by all accounts, a satisfactory police recruit with no discipline and with satisfactory scores on all prior exams. The adverse action sustained by Complainant -- dismissal for an alleged integrity class I violation -- was imposed only on Complainant and one other Class 49-10 recruit who was also a candidate of color whereas white recruits received lesser discipline for their infractions. These circumstances satisfy the elements of a prima facie case by establishing that Complainant was treated differently from similarly-situated, qualified persons not of his protected class, i.e., white recruits.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. at 665. If Respondent does so, Complainant, at stage three, must persuade the fact-finder by a preponderance of evidence that Respondent’s articulated reason was not the real one but a cover-up for discrimination.

See Abramian, 432 Mass. 117-118; Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant can, but is not required to, prove discrimination on the basis of circumstantial evidence that convinces the trier of fact that Respondent's proffered evidence is not credible. See Blare v. Huskey Injection Molding Systems Boston, Inc., 419 Mass. 437, 445 (1995).

Respondent argues at stage two that there were sound reasons justifying Complainant's dismissal, to wit, his cheating on the final exam. Credible evidence supports this assertion by establishing that Complainant used the basement bathroom instead of the staff bathroom, initiated a conversation with another recruit who had already completed the exam, and solicited information pertaining to an answer on the exam. Officer Vragovic, the recruit from whom Complainant sought the information, was not at fault as he had already completed the exam, was downstairs where he was supposed to be, did not initiate a conversation with Complainant, and tried to avoid answering Complainant's question by giving a non-committal, non-substantive response and by immediately reporting the incident to the proper authorities. Complainant focuses on the fact that Officer Vragovic was allowed to file his Form 26 about the incident on the morning after it was assigned whereas Complainant was expected to draft a report about the incident during work hours on March 22, 2011, prior to taking the second part of the final exam. This distinction is accurate but de minimus in my judgment. The requirement that Complainant draft a report on the morning of March 22, 2011 was justified by the need to obtain his spontaneous, unstudied version of the events and avoid giving him an opportunity to confer with others. Respondent has thus articulated and produced credible evidence to support a legitimate, nondiscriminatory reason for

terminating Complainant from Recruit Class 49-10.

Turning to stage three, Complainant points to Caucasian recruits who received lesser discipline for serious infractions as evidence that Complainant's integrity violation was not the real reason for his dismissal but a cover-up for discrimination. As Complainant points out, both he and Rosa were terminated from the Academy whereas white Recruit Officers Flaherty, Bernazzani, and Conley only received warnings.

Respondent argues that the recruits who received lesser discipline are not comparators because they were not disciplined for class I integrity violations. Such is the case but this distinction overlooks the disparate nature of the charges themselves, i.e., the imposition of more serious charges in relation to black recruits and less serious charges in relation to white recruits. A disciplinary pattern that reflects the racial identity of the recruits is itself a form of disparate treatment whether or not the circumstances leading to each discipline are identical. See Trustees of Health & Hospitals of Boston, Inc. v. MCAD, 449 Mass. 675, 682-683 (“[A] comparator’s circumstances need not be identical to those of the complainant.”).

In responding to the allegation of disparate treatment, Respondent maintains that Recruits Bernazzani and Conley did not commit a class I violation punishable by dismissal from the Academy because they were just “horsing around.” The objective facts establish, however, that Bernazzani and Conley were brawling on the street in a manner that violated Academy performance standards and resulted in the need for emergency hospital care. The characterization of “horsing around” was accepted without an independent investigation even though the parties provided conflicting accounts of the incident in their oral and written reports. Although the recruits could have been

terminated based on the determination that they committed class I violations (conduct unbecoming), the Academy chose to impose written warnings instead.

Buttressing the claim that Complainant received more severe punishment for a class I violation than did comparable white recruits is the experience of black Recruit Officer Domingos Rosa. Rosa was separated from the Academy for an incident that appears to have been a misunderstanding rather than a willful attempt to deceive a superior officer. The Academy determined that Rosa falsely reported that he was instructed by Officer Ezekiel not to bring in all his uniforms and equipment for inspection, but credible evidence supports Rosa's assertion that he initially denied making such a claim, tried to stick to his version of what happened despite being pressed to change his answer,¹¹ thereafter changed his answer to conform to what his supervisors wanted him to say, but ultimately reverted to his original position based on the assertion that he had been pressured into "lying about lying" in order to appease the staff. I conclude that Rosa's version of this incident is more credible than the version pressed by Respondent. Rosa's experience at the Academy appears to be yet another example of recruits of color being denied the benefit of the doubt in comparison to white officers who received more lenient consideration in regard to discipline.

In contrast to Rosa, white Recruit Officer George Flaherty received no discipline for an incident in which he, like Rosa, repeatedly gave one response to a superior officer and then switched his answer. In Flaherty's case, the initial response was "yes" when asked by Officer Ezekiel whether he had shaved that morning, an answer which he subsequently switched to "no" according to the credible testimony of Rosa and

¹¹ According to Rosa, Officer Ezekiel did not tell him to bring in all his uniforms and equipment but neither did Officer Ezekiel affirmatively order him not to do so.

Complainant. Flaherty subsequently received additional discipline for drunkenly accosting a Boston police officer in public with questions about the officer's uniform, but the discipline was only an oral warning. Three weeks later, Flaherty ran a red light while driving sixty miles an hour in a forty mile per hour zone and was disciplined yet again. His third discipline consisted of a written warning despite the fact that Academy rules provide for dismissal for a class II offense following imposition of a prior disciplinary warning.

In contrast to the lenience accorded white Recruit Officer Flaherty, black Recruit Officer Melvin Ligon received more severe discipline than that outlined in the Academy Training Manual when he was given a written warning the second time he was disciplined for failing to carpool. The Training Manual states that a failure to carpool calls for counseling or an oral warning in the first instance and an oral warning in the second instance. Contrary to the specifications in the Manual, Ligon received an oral warning on the first occasion he was disciplined for failing to carpool and a written warning on the second occasion. His discipline therefore exceeds that set out in the Manual.

Ligon received harsh treatment yet again when he subsequently received a second written warning for failing to return a uniform belonging to his former employer, the Trial Court. The Academy deemed Ligon's failure to return the uniform to constitute conduct unbecoming even though examples of unbecoming conduct in the Training Manual -- illegal acts, disorderly conduct, the use of vulgar, humiliating, obscene or offensive language -- appear to be more serious than the oversight committed by Ligon. More to the point is the Manual's definition of courtesy as including "cooperative effort."

Since a failure to return an article of clothing to a prior employer denotes a lack of cooperation, Ligon's oversight may reasonably be deemed "discourteous." Had the Academy characterized Ligon's oversight to be a lack of courtesy, his failure would have merited the lowest classification of offense rather than a written warning.

In an attempt to refute the foregoing, Respondent points to the Academy's treatment of Recruit Officer Peter King as an example of preferential treatment accorded a black police recruit accused of cheating. Registrar Eblan testified that he rejected the allegation that King had cheated by writing in his exam booklet and on this basis declined to initiate King's termination. Despite rejecting the cheating allegation, it is noteworthy that the Academy still gave King a written warning for writing in the exam booklet. Respondent fails to explain why it imposed a written warning rather than counseling or oral warning for such an action.

Based on the foregoing, I conclude that Respondent has failed to provide racially-neutral reasons for imposing harsher discipline on Complainant and other black recruits than that imposed on white recruits. Respondent likewise fails to explain why integrity violations are more serious than other class I offenses such as brawling in public. By allowing recruits who have committed integrity violations to return to the Academy in a subsequent recruit class, Respondent undercuts its argument that such a violation renders a recruit unfit to fill the role of a police officer.

The above analysis does not absolve Complainant from culpability for his actions in regard to the March 21, 2011 final exam. It remains a mystery why a recruit such as Complainant, with passing grades on all prior exams and a solid performance on the exam at issue, would have risked his career by discussing the final with a recruit whom

he barely knew. Nonetheless, a preponderance of credible evidence establishes that he did so. Thus, the Academy had just cause to discipline Complainant provided the discipline was equivalent to that imposed on white recruits for comparable violations. Since the discipline imposed on Complainant exceeded that of similarly-situated comparators not of his protected class, I conclude that Respondent engaged in disparate treatment based on race.

IV. REMEDIES AND DAMAGES

A. Affirmative Relief

Pursuant to G.L.c.151B, sec. 5, the Commission has the authority to issue orders for affirmative relief, including reinstatement. I conclude that the findings of fact set forth in this decision merit such action. Accordingly, Complainant is entitled to reinstatement as a recruit officer with his dismissal converted into a final written warning and credit granted for his having completed the academic portion of Recruit Academy training. If Complainant successfully completes the remaining Academy requirement, he shall be entitled to: 1) an award of back pay damages consisting of the differential, if any, between what he would have earned as a recruit officer who graduated from the December, 2011 Academy class and what he has actually earned since his March, 2011 dismissal from the Academy and 2) whatever seniority and other benefits he would have accrued as a Boston police officer between completion of the December, 2011 Academy and implementation of this order.

B. Emotional Distress Damages

An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the

nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004).

Complainant testified that he experienced anxiety and depression as a result of being terminated by Respondent. He describes himself as being in a “dark place” where he lacked the drive to do anything. He attended marriage counseling with his wife for just under a year to deal with the emotional turmoil caused by his termination. A year after his termination, Complainant went to the emergency room and was diagnosed as having a panic attack. Based on the foregoing I conclude that Complainant is entitled to \$40,000.00 in emotional distress damages.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent is ordered to:

- (1) Cease and desist from the disparate treatment of recruits based on race in the imposition of penalties for Training Academy violations;
- (2) Reinstate Complainant to the next Recruit Training Academy with credit for having successfully completed the Academic portion of the course.
- (3) Pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$40,000.00 in emotional distress damages.
- (4) If Complainant successfully completes all Academy training requirements:
 - 1) pay Complainant back pay damages consisting of the differential, if any, between what he would have earned as a recruit officer who graduated from

the December, 2011 Academy class and what he has actually earned since his March, 2011 dismissal from the Academy; and 2) award Complainant whatever seniority and other benefits he would have accrued as a Boston Police officer between completion of the December, 2011 Academy and implementation of this order.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 28th day of December, 2015.

A handwritten signature in cursive script, appearing to read "Betty E. Waxman", written over a horizontal line.

Betty E. Waxman, Esq.,
Hearing Officer